UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OZARK AUTOMOTIVE DISTRIBUTORS, INC., DOING BUSINESS AS O'REILLY AUTO PARTS, **Respondent,** **and** **TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, INDUSTRIAL AND ALLIED WORKERS OF AMERICA, LOCAL 166, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CTW,** **Charging Party.**	**CASE NOS.: 21-CA-39846 & 21-RC-021222** **RESPONDENT OZARK AUTOMOTIVE DISTRIBUTORS, INC., DOING BUSINESS AS O'REILLY AUTO PARTS' REPLY TO NLRB'S MOTION TO REMAND CASE TO REGIONAL DIRECTOR FOR APPROVAL OF THE UNION'S WITHDRAWAL REQUEST AND STATEMENT OF POSITION ON REMAND**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Federal Cases

Federal Statutes

Other Authorities

I. STATEMENT OF THE CASE.

This case comes now before the National Labor Relations Board ("NLRB" or "Board") on remand from the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit" or the "Court") involving Respondent Ozark Automotive Distributors, Inc., doing business as O'Reilly Auto Parts' ("O'Reilly," the "Company," or "Respondent") refusal to bargain with the Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers Of America, Local 166, International Brotherhood of Teamsters, CTW (the "Union") based on an improper certification of representative. On February 10, 2015, the D.C. Circuit issued a decision granting O'Reilly's petition for review, denying the NLRB's cross-application for enforcement, and remanding the case to the Board for further proceedings. *See Ozark Auto. Distribs. v. NLRB*, 779 F.3d 576 (D.C. Cir. 2015). The parties were requested to submit their Statement of Position on Remand by September 30, 2015.[1]

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[1] O'Reilly has previously submitted briefs in support of its contentions in both of the earlier proceedings before the Board. In submitting this statement of position, Respondent assumes that the Board, as part of its re-evaluation of its earlier decisions, will review those briefs. The issues raised by the D.C. Circuit in its decision remanding the case to the Board are addressed in those briefs. These briefs are therefore incorporated herein by reference.

Before the Board and the D.C. Circuit, Respondent posed several arguments against the Board's certification of the Union. Respondent argued and presented evidence through witness testimony of the Union's unlawful conduct through its agents and/or third party actors that destroyed the election's laboratory conditions. Specifically, during the hearing on the objections, numerous employees testified that the Union and its agents made threats, both to employment and physical safety, and harassed employees who supported the Company. Because of the determination it made, the D.C. Circuit did not address those issues in its decision, and they are not currently before the Board on remand. However, in submitting this statement of position and limiting it to the issues set forth by the Court, Respondent is in no way abandoning or waiving these other contentions or conceding the correctness of the Board's determinations with respect to them. In fact, the Company continues to maintain that the Board's determinations with respect to these issues are incorrect and the election should be set aside.

On September 30, 2015, the Counsel for the General Counsel filed the Motion to Remand Case to the Regional Director for Approval of the Union's Withdrawal Request ("Motion"). The Company submits this Reply to the Motion and also as the Statement of Position on Remand.

In July 2010, the Union filed a petition with the Board to represent the "full-time and regular part-time route drivers" (the "bargaining unit" or "unit") at the Company's distribution center in Moreno Valley, California ("Petition"). On August 13, 2010, the Union won the election by a vote of 17 to 14; one ballot was found to be void ("2010 Election"). The Company filed objections to the 2010 Election alleging, among other things, that the Union and its agents engaged in threats, harassment, coercion, and appeals to racial prejudice, which interfered with employee free choice and made a fair election impossible. The Company timely served a subpoena on the Union and a second subpoena on Oscar Castillo ("Castillo") seeking documents relating to the issues raised in the objections. Both the Union and Castillo submitted Petitions to Revoke certain portions of the subpoenas. The Regional Director scheduled an objections hearing on the matter. During the hearing, the hearing officer refused to rule on the Petitions to Revoke, and instead informed the parties she would delay issuing her ruling on all disputed requests in the subpoenas until the end of the hearing. The hearing officer ignored the Company's offers to tailor the subpoenas and failed to conduct an *in-camera* inspection of the disputed documents. At the close of the hearing, the hearing officer granted the Union's and Castillo's Petitions to Revoke the Subpoenas as to all the disputed requests. The Company filed a special appeal with respect to the hearing officer's ruling, which was denied. Thereafter, the hearing officer denied the Company's objections and certified the Union. Despite the Company's exceptions to the hearing officer's decision, the NLRB subsequently adopted the hearing officer's findings and determinations.

The Union subsequently filed an unfair labor practice charge 21-CA-039846 ("Charge"). The Board's Acting General Counsel issued a complaint alleging that O'Reilly had violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. § 158(a)(1) and (5) ("Complaint"), by refusing the Union's request to bargain and to furnish information to the Union. O'Reilly continued to challenge the validity of the Union's certification while the Board found the Company in violation of the Act. O'Reilly petitioned for judicial review, and the NLRB cross-petitioned for enforcement.

The D.C. Circuit found the hearing officer erred in revoking the Company's subpoenas, and the Board's approval of the hearing officer's findings constituted prejudicial error. As the Court explained, O'Reilly was unable to fully present its case due to the hearing officer's conduct and rulings. The D.C. Circuit correctly found that by revoking O'Reilly's subpoenas, the hearing officer and the Board, by adopting the hearing officer's ruling, did not grant O'Reilly the opportunity to prove its allegations, which constituted prejudicial error.

Since the D.C. Circuit held the Company was prejudiced by the hearing officer's revocation of the Company's subpoenas and the Board's adoption of the hearing officer's ruling, the Company did not violate the Act by refusing to bargain and to furnish information to the Union. The Company does not oppose Counsel for the General Counsel's request to permit the Union to withdraw the Charge. However, the Company submits any withdrawal must be with prejudice. If the NLRB does not remand the case to the Regional Director to approve of the withdrawal, the Complaint against the Company must be dismissed in its entirety since the Company did not violate the Act.

The Company agrees with the Counsel for General Counsel and Union that the 2010 Election should be set aside. The Company would join in requesting the 2010 Election be set

aside. However, the Company takes the position that the NLRB should not schedule a rerun election. The Company submits a new election should occur only if the Union files a new representation petition for election supported by a new showing of interest.

If the 2010 Election is not set aside based on the Union's request, it is now undisputed that O'Reilly suffered prejudicial error at the objections hearing. Without access to the information sought by the subpoenas, O'Reilly was deprived of the opportunity to present its case, including rebutting contentions made by the Union and statements made by the witnesses. Accordingly, the hearing officer's findings and rulings are incorrect and incomplete since they are not based on a full record of the evidence. As such, the hearing officer's credibility determinations and findings must be overturned.

This case is unique: 5 years have passed since the 2010 Election. If the NLRB does not approve the Union's request to withdraw the Charge and set aside the 2010 Election, the Company asserts the Board should dismiss the Complaint and set aside the 2010 Election because O'Reilly likely no longer has access to the same evidence it once had or could have had at that time. Half of the witnesses called at the 2010 objections hearing are no longer with the Company. Even if O'Reilly is able to reach these individuals, it is unlikely their recollection of events from 5 years prior is of the same quality it would have been when the hearing was originally held. Furthermore, there has been high turnover within the bargaining unit – more than 50% of the original bargaining unit is no longer with the Company. The present makeup of the unit is not comparable to the unit at the time of the 2010 Election. Since the Company's access to evidence is now limited and the bargaining unit is not a complement to the original 2010 unit, the 2010 Election should be set aside and the Petition dismissed.

If the Board decides not to permit the withdrawal of the Charge and does not set the 2010 Election aside, the Board has the power to order the objections hearing re-opened and enforce O'Reilly's subpoenas. However, if Counsel for the General Counsel, Castillo, or the Union has failed to preserve the documents requested by the subpoenas, the Board must set aside the 2010 Election and dismiss the Petition. To do otherwise would once again constitute prejudicial error since O'Reilly would once more be deprived of access to the documents, witnesses, and evidence necessary to prove its allegations. In addition, the failure to preserve critical evidence at the very center of litigation demands the harshest sanctions under the law. All parties subpoenaed were represented by counsel so there can be no excuse for a failure to preserve documents and information. Additionally, the Board should require the subpoenaed documents, if preserved, be produced at least 30 days *prior* to the re-opening of any hearing to ensure the Company has the opportunity to review the documents and locate and serve potential witnesses, given the 5 year delay since the objections hearing was held.

II. ARGUMENT.

A. The Company Agrees with the Union That the NLRB Should Approve the Union's Request to Withdraw the Charge and Set Aside the 2010 Election.

On September 30, 2015, the NLRB filed the Motion to Remand Case to the Regional Director for Approval of the Union's Withdrawal Request. The NLRB did not file a Statement of Position on Remand. The Union filed a Non-Opposition to the Motion by the Counsel for the General Counsel. The Union also did not file a Statement of Position on Remand. As a result, the Company's Statement of Position on Remand is unopposed. The Motion stated the Union has requested the 2010 election be set aside and the Union wants to withdraw the Charge in order to set aside the 2010 Election.

The Company agrees with the Counsel for General Counsel and Union that the 2010 Election should be set aside and the Union should be permitted to withdraw the Charge. The Company submits that the Board order any approval of the withdrawal be with prejudice.

While prior Board case law has found that the passage of time or turnover in the unit should not impact a rerun election, the Company takes the position that this case is distinguishable in that a 5 year time period and the current turnover is too significant to disregard. See the Company's arguments set forth in Section D below regarding the unit. The NLRB should require the Union to file a new representation petition for election supported by a new showing of interest instead of directing a rerun election. Of the 32 employees who were eligible to vote in the 2010 election, only 16 employees from the original unit remain at the Company. The unit has expanded from 32 drivers in 2010 to currently 37 drivers. Fewer than half of the current drivers (43%) were employed by the Company at the time of the 2010 Election. The 2010 unit is not a reasonable complement to the current unit and a new election cannot be ordered unless the Union files a new representation petition supported by a new showing of interest.

B. The Board's Adoption of the Hearing Officer's Decision to Quash Respondent's Subpoenas Constituted Prejudicial Error.

At the hearing on objections, the hearing officer revoked the Company's subpoenas, and the Board adopted this ruling. The D.C. Circuit found the Company was prejudiced at the hearing since it was prevented from putting forward its case. The Court commented on page 19 of its decision:

> We shall do the same and end with this passage from Chief Justice Traynor's monograph: "There are sometimes errors at a trial that deprive a litigant of the opportunity to present his version of the case. These are also ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment. When, for example, an appellant has been deprived of the opportunity to summon

> witnesses, the appellate court can hardly determine what testimony would have materialized but for the error. No subjunctives can fill the void in a very present record." TRAYNOR, THE RIDDLE OF HARMLESS ERROR 68.

On remand, the Board must now rectify the prejudicial error suffered by the Company.

1. The Hearing Officer Should Not Have Granted the Union's and Castillo's Petitions to Revoke the Subpoenas *Duces Tecum*.

On July 10, 2010, the Union filed a petition and the election took place on August 13, 2010. There were 17 votes in favor of the union, 14 votes against it, and a ballot which was declared void. The Company filed objections to the 2010 Election alleging that the Union and its agents engaged in conduct that interfered with employee free choice and made a fair election impossible. On August 27, 2010, the Company submitted evidence in support of its objections. *See* Employer's Evidence in Support of Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election; *see also* Petitioner's Brief and Reply. The Regional Director issued a Report on Objections and Notice of Hearing directing that a hearing be held on the Employer's Objections. The Regional Director ordered an evidentiary hearing to determine the validity of the Company's objections.

Prior to the hearing, the Company served two subpoenas: one on the Union and the other on Castillo. The subpoena *duces tecum* served on the Union sought documents relating to, among other items, the Company, the Company's employees, and certain named employees "serving, acting or functioning as an agent, official, representative or steward of the Union." *See* subpoena *duces tecum* B631017 served on the Union. The subpoena also sought information about communications between the Union, including its representative Ruben Luna, and the Company's employees and between the Union and the employees the Company maintained were acting as Union agents, including Oscar Castillo, Manuel Reyes, and Robert Castilleja. *See id.* The subpoena *duces tecum* served on Castillo sought telephone records and other documents (but

not the content or substance of the calls) relating to calls between Castillo and the Union, and between Castillo and other employees eligible to vote. *See* subpoena *duces tecum* B631016 served on Castillo.

The Union filed a Petition to Revoke specific sections of the subpoena, arguing the Company's requests were "so vague and overbroad as to implicate information that is protected by the attorney-client and attorney work-product privileges." *See* Union's Petition to Revoke. The Union also contended these objected-to requests, "do not describe with any particularity the evidence whose production is required, and seek documents which clearly do not relate to discrete issues framed in this case." *See id.* On the second day of the objections hearing, Castillo orally submitted a Petition to Revoke the subpoena for the same reasons described above while being represented by the Union's lawyer.

During the hearing, the hearing officer informed the parties she would delay issuing her ruling on all disputed requests in the subpoenas until the end of the hearing. (Tr. 176:24-177:3).[2] O'Reilly objected, on numerous grounds, to the decision to not rule on any of the disputed requests in the subpoenas until the end of the hearing as the decision to do so prejudicially affected O'Reilly's rights. (Tr. 177:4-179:17.) O'Reilly repeatedly offered to tailor the requests in the subpoenas to only non-objectionable documents within the scope of the original requests. (Tr. 177:13-15.) At the close of the hearing, the hearing officer granted the Union's and Castillo's Petitions to Revoke the Subpoenas as to all the disputed requests. The hearing officer, over the Company's objection, refused to require the Union or Castillo to produce any documents. (Tr. 464:9-466:14.) The hearing officer did not explain why she did so

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[2] References to Tr. __ are to the Transcript of Testimony Before the hearing officer at the September 20-21, 2010 Hearing.

without conducting an *in camera* inspection of the documents or attempting a compromise in order to ensure a fair hearing regarding the documents as the Company repeatedly offered to do. The hearing officer recommended the Board overrule the Company's objections and certify the Union.

Before the hearing officer issued her reports, the Company filed a request for "special permission" to appeal the hearing officer's rulings on the subpoenas. The Regional Director denied the request. The Company filed exceptions to the hearing officer's report and rulings on the subpoenas. On appeal, the Board adopted the hearing officer's findings and recommendations and certified the Union as the employees' collective-bargaining representative. *Ozark Auto. Distribs., Inc.*, Case 21-RC-2122 (Mar. 31, 2011), 2011 NLRB LEXIS 148 (N.L.R.B., Mar. 31, 2011).

Notably, Member Hayes dissented from the majority's decision to issue the Certification of Representative. *See id.* at 2. Specifically, Member Hayes found the hearing officer did not utilize the appropriate test in deciding to revoke the subpoenas. Rather, he noted that "[t]he hearing officer was required to balance two legitimate interests – the employees' confidentiality interests and the Employer's right to litigate its case." *Id.*, *citing ManorCare Health Services-Easton*, 356 NLRB No. 39 (2010) ("Board precedent is clear that in considering this issue, I must balance the confidentiality interest of employees to engage in union activity ... against the Respondent's right to full and effective cross-examination"). In finding the hearing officer's subpoena rulings "lack[ed] coherent analysis," Member Hayes stated that "[t]he hearing officer focused on the employees' interests and failed to consider the Employer's countervailing interests." *Id.* at 2.

Thereafter, O'Reilly continued to contest the Union's certification and refused to provide information requested by the Union in preparation for collective bargaining. O'Reilly also refused to bargain with the Union. The Union filed the Charge and the NLRB issued the Complaint. O'Reilly challenged the validity of the Union's certification. *Ozark Auto. Distribs., Inc.,* 357 N.L.R.B. No. 88, at 1 and n.2 (Sept. 8, 2011). The Board concluded that O'Reilly's refusal to bargain and to furnish the requested information violated the Act. *Id.* at 2. O'Reilly appealed the Board's decision.[3]

2. The D.C. Circuit Found the Hearing Officer Erred in Revoking O'Reilly's Subpoenas and the Board Erred in Adopting This Ruling.

The D.C. Circuit found the hearing officer's revoking the Company's subpoenas *duces tecum* and the Board's approval of the hearing officer's findings constituted error and prejudiced the Company. In its objections to the election, O'Reilly maintained that several Union agents engaged in objectionable conduct that destroyed laboratory conditions for a fair election. In particular, O'Reilly alleged that during the critical period, four employees (Castillo, Manuel Reyes, Robert "Bobbie" Castilleja, and Adrian Garcia) engaged in various instances of objectionable conduct while acting as agents of the Union or under the third party standard. O'Reilly's subpoenas sought several types of information, including those directly bearing on

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[3] After oral argument was heard by the D.C. Circuit, the case was placed in abeyance pending the Supreme Court's review of *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013), *cert. granted,* 133 U.S. 2550 (2014), because one of the Board Members, Craig Becker, was a recess appointee. After the Supreme Court issued its decision in *Noel Canning,* the D.C. Circuit found that Mr. Becker's appointment did not violate the Recess Appointments Clause of the Constitution. *Mathew Enterprise, Inc. v. NLRB,* 771 F.3d 812 (D.C. Cir. 2014). The present case thus remained in abeyance until December 2014, when the Court issued an order placing this case back on calendar. Order Granting Mot. to Life Abeyance, *Ozark Auto. Distribs., Inc.* No. 11-1320 (D.C. Cir. Dec. 8, 2014).

these allegations: whether certain employees had actual or apparent authority to act on the Union's behalf.

The Board, "assuming the information sought in the Employer's subpoenas ha[d] some relevance to the Employer's case," upheld the hearing officer's decision to revoke the Company's subpoenas on the ground that there "ha[d] been no showing that the Employer's need for [the requested] information was paramount to the employees' confidentiality interests protected by [Section] 7 of the Act." *Ozark Auto. Distribs. v. NLRB*, 779 F.3d 576, 581 (D.C. Cir. 2015), quoting *Ozark Auto. Distribs., Inc.,* 357 N.L.R.B. No. 88, at 2 n.2. In approving the hearing officer's decision, the Board found in the absence of such a showing, the hearing officer "correctly protected the employees' interests in keeping confidential their communication with a union, an important aspect of the employees' 'engage[ment] in organizing.'" *Id.*, quoting *Nat'l Tel. Directory Corp.*, 319 N.L.R.B. 420, 420-421 (1995) (alteration in original).

a. <u>The Hearing Officer Never Attempted To Balance The Company's Interests Against The Employee's Interest</u>.

The D.C. Circuit found the "Board's reasoning ... flawed." *Ozark Auto. Distribs. v. NLRB*, 779 F.3d at 581. The Court explained that the "hearing officer never attempted to balance those employee interests against the company's need for documents," just as Member Hayes had pointed out in his dissent. Furthermore, "there is no indication in the record that the Board did so either." *Id.* The D.C. Circuit elaborated on the hearing officer's and Board's failure to balance these competing interests. The Court noted that, for instance, "at least some of the document requests did not implicate any employee's confidentiality interests. The Castillo subpoena ... sought records of telephone calls between Castillo and the union, and between Castillo and other employees eligible to vote in the election. In its requests for this information,

the company sought the date and time of each call, but not the content of the call." *Id.* In this instance, the Court highly doubted how these requests could impinge on employees' privacy rights and overwhelm the Company's need for this information. The Court went even further noting that during the hearing when Castillo was asked by O'Reilly's counsel whether he had spoken with anyone at the Union, there was no objection by the Union's counsel to this line of questioning. The Court noted that if no objection was raised at that time, "surely [Castillo] could not have had any legitimate objections to producing records of calls between him and the union." *Id.* Furthermore, at the hearing, some employees testified that Castillo had threatened them. The Court explained that these employees "would have no objection to their employers' receipt of records showing Castillo had in fact called them." *Id.*

Although the above requests were easily demonstrated not to impinge on employees' privacy rights, the D.C. Circuit's opinion also addressed subpoena requests it believed may have required more detailed inspection. For such requests, which sought "any and all" documents relating to calls between Castillo and the Union and Castillo and Company employees, "the hearing officer should have first attempted to reconcile the employees' confidentiality interests with the company's need for the documents. There is nothing in the record to suggest that the hearing officer tried to do this." *Id.* As the Court noted and O'Reilly argued in its Brief, the hearing officer did not require production of the documents for *in camera* review. *Id.; see also* Petitioner's Brief, p. 7, 9, 12-13, 18-19. The hearing officer did not narrow the scope of the subpoenas, either, even though O'Reilly repeatedly offered to tailor its subpoena requests to only non-objectionable documents. *See* Petitioner's Brief, p. 12. Nor did the hearing officer attempt to forge any other compromise pertaining to the subpoenaed documents. *See id.*at 13. Instead of revoking the subpoenas at the close of all evidence, the hearing officer should have followed at

least one of the multiple options provided for in the Board's Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings which would have ensured a fair hearing:

> [I]f a party served with a subpoena contends that the items encompassed by the subpoena are irrelevant, privileged or otherwise exempt from production, the hearing officer *should consider conducting an in camera inspection.* The hearing officer should *also look for areas of compromise,* e.g., redaction of certain information or narrowing the scope of subpoena, in order to satisfy the subpoenaing party and allow the hearing to proceed. (Emphasis added.)

NLRB Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings, Section II(B)(1) (2003). The D.C. Circuit echoed O'Reilly's position that the hearing officer should have followed the NLRB Guide for Hearing Officers by conducting an *in camera* review of the documents to determine how to cure the objection. *Ozark Auto. Distribs. v. NLRB*, 779 F.3d at 582.

As explained above, it was "critical" to the Company's case to establish that the above-named employees were acting as Union agents. The hearing officer's refusal to rule on the subpoenas until the close of the hearing "exacerbated the prejudice." At the Court explained:

> A ruling against the company, rendered before the hearing, could have alerted the company of the need to alter its presentation, to decide whether to call additional witnesses, to seek other documents from other sources, and to reformulate questions for cross-examination. All trial lawyers know the danger of the unknown. The Supreme Court has said as much: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor,* 329 U.S. 495, 507 (1947). The Court wrote this about civil litigation in federal courts. What the Court said applies as well to evidentiary hearings before administrative bodies.

Ozark Auto. Distribs. v. NLRB, 779 F.3d at 582. As the D.C. Circuit agreed, by refusing to rule on the subpoenas and Petition to Revoke until the close of evidence, the hearing officer prevented O'Reilly from being able to adapt its presentation of evidence to take into

consideration the ruling and required O'Reilly to wait until it was too late to learn whether any documents would be ordered produced, and whether it would be permitted to use any of the documents, resulting in great prejudice. The hearing officer erred in revoking the Company's subpoenas, and the Board's approval of the hearing officer's decision was thus improper.

3. Board Committed Prejudicial Error by Adopting the Hearing Officer's Ruling to Revoke O'Reilly's Subpoenas.

The D.C. Circuit disagreed with the NLRB's argument that its bargaining order should be enforced even if it erred in quashing the subpoenas because the Company failed to show it suffered any prejudice due to the revocation. The Court found that O'Reilly was prejudiced by the hearing officer's delay in ruling on the subpoenas, by her decision to ultimately revoke both subpoenas in their entirety, and the Board's adoption of the hearing officer's ruling.

First, the Court explained that "[i]n administrative law, as in federal civil and criminal litigation, there is a harmless error rule: § 706 of the Administrative Procedure Act, 5 U.S.C. § 706, [which] instructs reviewing courts to take 'due account … of the rule of prejudicial error.'" *Ozark Auto. Distribs. v. NLRB*, 779 F.3d at 582-583, quoting *PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (quoting 5 U.S.C. § 706) (ellipses in original); *see also Shinseki v. Sanders*, 556 U.S. 396, 406 (2009); *Nat'l Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659-660 (2007) (quoting *PDK Labs.*, 362 F.3d at 799, when applying the rule of prejudicial error); *Canova v. NLRB*, 708 F.2d 1498, 1502-03 (9th Cir. 1983); *800 River Rd. Operating Co., LLC d/b/a Woodcrest Health Care Ctr. & 1199 SEIU, United Healthcare Workers E.*, 359 N.L.R.B. No. 48 (Jan. 9, 2013) (Board applying harmless error to hearing officer's revocation of a subpoena).

Since the subpoenas were denied in their entirety, O'Reilly could not have anticipated what they would produce. As such, it could not demonstrate how its need for the information

overcame the employees' interest in keeping their communications with the Union confidential, as argued by the NLRB. *Ozark Auto. Distribs. v. NLRB*, 779 F.3d at 583. The Court noted, "[t]here was an erroneous denial of discovery as the matter ultimately developed. Such a denial is ordinarily prejudicial. It is not possible to determine here whether the outcome would have been different had discovery been permitted." *Id.* at 583, quoting *Shaklee Corp. v. Gunnell*, 748 F.2d 548, 550 (10th Cir. 1984). Even without the ability to review the documents responsive to the subpoenas, the Court explained how it could be inferred that such documents likely existed and were in the possession of the Union and Castillo based on their responses to certain requests in the subpoenas. Rather than objecting, the Union responded that it had no documents responsive to requests one to three, and seven to nine; meanwhile, it objected to the remaining requests. *Ozark Auto. Distribs. v. NLRB*, 779 F.3d at 583. As the Court explained, "[i]f they had no documents, we cannot see how requiring compliance with the subpoenas could possibly have affected anyone's privacy interests." *Id.*

a. The Court Found the Company's Requests Were Relevant.

The Court dismissed the NLRB's arguments doubting the relevancy of the documents sought by O'Reilly. The Court found the requested information was relevant. Applying the Federal Rules of Evidence, Rule 401, which provides, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," the D.C. Circuit found the requested telephone records bore directly on the subject of whether Castillo and the other employees were acting as Union agents. Whether these employees' conduct should be attributed to the Union invariably depends on the "amount of association" between the Union and these employees. *Ozark Auto. Distribs. v. NLRB*, 779 F.3d at 584, quoting *PPG Indus., Inc. v. NLRB*, 671 F.2d

817, 822 n.8 (4th Cir. 1982); *see NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 115 (D.C. Cir. 2012). The Court also noted how the documents requested by O'Reilly were relevant to the testimony of at least one witness – Castillo – and may have even disapproved his testimony, which the hearing officer discredited.[4] *See Ozark Auto. Distribs. v. NLRB*, 779 F.3d at 584-585. Quoting from *Drukker Commc'ns, Inc. v. NLRB,* 700 F.2d 727, 734 (D.C. Cir. 1983), the Court found the "Board's actions must be set aside because it was taken without observance of procedure required by law, 5 U.S.C. §706(2)(D) (1976)." In *Drukker* the Court held that because the Board refused to allow an employer to subpoena a witness in a proceeding challenging the validity of a representation election, this constituted prejudicial error. *Id.* at 731-734.

In an analogous case, the Court found the Board's revocation of a hospital's subpoenas in a proceeding challenging a representation election was prejudicial error and warranted setting aside the election. *See Indiana Hospital, Inc. v. NLRB,* 10 F.3d 151 (3d Cir. 1993). Like here, the hospital contested the election, alleging the Board's agents engaged in objectionable conduct during the election campaign. The hospital served subpoenas seeking documents that reflected telephone calls between the Board's staff members and hospital employees. *Id.* at 152. The hearing officer revoked the subpoena. The Court in *Indiana Hospital* held the hearing officer's revocation was prejudicial because the hospital could have used the documents in "at least three significant ways." *Id.* at 154. The D.C. Circuit agreed with the Court in *Indiana Hospital*. As in the *Indiana Hospital* case, O'Reilly's subpoenas could have been used to introduce the

[4] As the Court noted, "when a hostile witness realizes that examining counsel has information bearing on the answers to counsel's questions, the witness tends to be more candid." *Ozark Auto. Distribs. v. NLRB*, 779 F.3d at 585. Since O'Reilly's subpoenas were revoked, it was never given access to the information that very well may have been used to demonstrate the untruthfulness of Castillo's and other witnesses' testimony. O'Reilly "was deprived of this incentive for truthful and complete testimony." *Id.*

documents into evidence; to identify employees the Union had called; and O'Reilly could have used the information in examining those employees. *Id.* at 154-155; *see also Ozark Auto. Distribs. v. NLRB*, 779 F.3d at 585.

In concluding its opinion, the D.C. Circuit addressed the "harmless error rule" and the Supreme Court's rejection of the Federal Circuit's application of the rule of prejudicial error in *Shinseki v. Sanders,* 556 U.S. 396 (2009). *Ozark Auto. Distribs. v. NLRB*, 779 F.3d at 586. The Court cites, in pertinent part, to *The Riddle of Harmless Error* by former California Supreme Court Chief Justice Roger J. Traynor: "When, for example, an appellant has been deprived of the opportunity to summon witnesses, the appellate court can hardly determine what testimony would have materialized but for the error. No subjunctives can fill the void in a very present record." Traynor, *The Riddle of Harmless Error*, 68. Here, the hearing officer's decision to permit the Union and Castillo to avoid producing a single document in response to the valid subpoenas resulted in an unfair hearing. The hearing officer's action placed a barrier in the way of the Company's ability to present its case, constituting prejudicial error.

O'Reilly was prejudiced by both the hearing officer's delay in ruling on the subpoenas and the ruling itself. O'Reilly's case was severely hampered since it was not afforded the opportunity prior to the commencement of the hearing or, at the least, prior to the conclusion of the presentation of evidence to obtain and review the documents and information responsive to the subpoenas, and use them in its case-in-chief, in cross-examination of the Union's witnesses, or in rebuttal. By refusing to rule on the subpoenas and Petitions to Revoke until the close of evidence, the hearing officer prevented O'Reilly from being able to adapt its presentation of evidence to take into consideration the ruling. It also forced O'Reilly to wait until it was too late

to learn whether any documents would be ordered produced, and whether it would be permitted to use any of the documents, which resulted in prejudicial error.

C. If the Union is Not Permitted to Withdraw the Charge, The Complaint Against the Company for Its Refusal to Bargain Must Be Dismissed.

If the Union is not permitted to withdraw the Charge, the Company submits the Complaint must be dismissed. The Board's Acting General Counsel issued the Complaint against the Company based on the Union's Charge for its refusal to bargain with and provide information to the Union. Based on the Court's decision, the Company did not violate the Act by refusing to bargain and failing to furnish information to the Union. As a result, the Complaint against the Company must be dismissed in its entirety.

D. In the Alternative, Due to the Significant Passage of Time and High Employee Turnover in the Bargaining Unit, the Board Should Set Aside the Election.

The Counsel for General Counsel and the Union's request to withdraw the Charge and set aside the 2010 Election should be granted. However, if the NLRB does not agree to the request, the Company argues that the Board should set aside the 2010 Election and dismiss the Petition based on the prejudicial error. The Company also argues that the election should be set aside because even if the Board enforces the subpoenas *duces tecum*, O'Reilly no longer has access to the same evidence it once had. Furthermore, there has been high turnover within the bargaining unit such that the present makeup of the unit is not comparable to the unit at the time of the election.

1. Alternatively, The Board Should Set Aside the Election Because of the Substantial Passage of Time and O'Reilly No Longer Having Access to the Same Evidence as Before.

Even if the Board enforces O'Reilly's subpoenas, O'Reilly will not truly be granted a fair hearing this far removed from the events giving rise to the objections. It has been well over 5

years since the objections hearing. In several Board cases, the time period between the objections hearing and the court's decision was significantly less than 5 years. This case is unique because of the amount of time that has lapsed. As described above, the objections hearing took place on September 20 and 21, 2010. To re-open the hearing now would prejudice the Company because it no longer has access to the same evidence. For instance, 13 employees testified at the objections hearing:

1. Mario Macchione
2. Louis Morrison
3. Manual Reyes
4. Jarrett Blackwell
5. Adrian Garcia
6. Oscar Castillo
7. Ricardo Carrillo
8. Efrain Vasquez
9. Santiago Albanian
10. Javier Soto
11. Joseph Cockell
12. Rafael Alvarez
13. Robert Castilleja

The first 7 witnesses listed are no longer employed by the Company. That is more than half of the witnesses who testified. Furthermore, of those no longer with the Company, several are major witnesses and key players to O'Reilly's objections, including Mario Macchione, Manuel Reyes, Adrian Garcia, and Oscar Castillo. In order to proceed, the Company would have to locate these witnesses and serve them with subpoenas to appear at the new hearing. Even if the witnesses are found and do show-up for the hearing, their memory of events from 5 years ago is unlikely to be clear. (The lack of access to witnesses and their faded memories is a problem both parties will likely face.) The Company likewise would face difficulties in seeking compliance with the subpoena *duces tecum* by Oscar Castillo. The Company would not be afforded a fair trial 5 years after the fact.

In two similar cases, *NLRB v. Connecticut Foundry Co.*, 688 F.2d 871, 881 (2nd Cir. 1982) and *NLRB v. Nixon Gear, Inc.*, 649 F.2d 906, 914 (2nd Cir. 1981), the courts refused to enforce Board orders because the Board had erroneously failed to permit the employers the opportunity to have a hearing on their objections to the election. The courts, in deciding whether to remand to the Board for a hearing, applied equity principles. The primary equitable consideration for the courts' decisions was the fact that the Board had erroneously declined to afford the employers the right to hearings on their objections. The courts relied on the assertions by the employers that the delay caused by the Board in not affording them hearings had decreased the possibility of the employers' prevailing at a hearing because witnesses' memories fade and some key witnesses may be unavailable. *See Nixon Gear*, supra, 649 F.2d at 906; *Connecticut Foundry*, supra, 688 F.2d at 881 (finding that "the NLRB's failure to order hearings on the issues we have specified renders the Company's burden on those issues much more difficult if not insurmountable.") The same is true here. The 5 year delay between the original objections hearing and potential re-opening of the objections hearing (at a time still unknown), has "decreased the possibility" of O'Reilly prevailing at hearing. As noted above some key witnesses may be unavailable as they no longer work for the Company, and even if all the witnesses are available, "witnesses' memories fade." This is especially true in light of the fact that the Company would have access to new information from the subpoenas. The new information from the enforcement of the subpoenas would lead to new facts and new lines of questioning. The witnesses at a new hearing may no longer recall, or recall in very general terms the new facts. Thus, like the employers in *Nixon Gear* and *Connecticut Foundry,* O'Reilly is essentially being denied the right to a true and fair hearing on its objections.

Furthermore, the courts in both *Nixon Gear* and *Connecticut Foundry* relied in part on the closeness of the vote in the elections. In *Nixon Gear,* the Board discussed the importance of a close vote in the context of evaluating conduct that could improperly influence an election:

> The election result was extremely close. We have previously admonished the Board that "(t)he need for a hearing is particularly acute when an election is close, for in such a situation, 'even minor misconduct cannot be summarily excused on the ground that it could not have influenced the election.'" *Nixon Gear*, supra, 649 F.2d at 914 citing to *NLRB v. Bristol Spring Mfg. Co.*, 579 F.2d 704, 707 (2d Cir. 1978) *quoting Henderson Trumbull Supply Corp. v. NLRB*, 501 F.2d 1224, 1230 (2d Cir. 1974).

Here, the Company lost by only 3 votes and one ballot was declared void. In this situation, the faded memories of witnesses and lost evidence from the passage of time would significantly impact such a close election result. Additionally, as demonstrated below, the Company has had high turnover in the bargaining unit overall, not just within the list of witnesses.[5]

2. <u>The Board Should Set Aside the Election Because There Has Been Significant Turnover Within the Bargaining Unit Such That the Unit From 2010 is Not a Reasonable Complement to the Current Unit</u>.

As can be seen from the list of witnesses, the Company has undergone significant turnover over the past 5 years, especially within the bargaining unit. In fact, of the 32 employees who voted in the 2010 election, only 16 employees from the original unit remain at the Company. The unit has expanded from 32 drivers in 2010 to currently 37 drivers. Fewer than half of the current drivers (43%) were employed by the Company at the time of the election. This is especially important considering the close election results in 2010: 17 voted in favor of the Union and 14 against. There is no way of knowing at present how many current employees who voted in the 2010 election are still in favor of Union representation, let alone the position of

[5] It is also important to note that the Union has not filed any unfair labor practice charges against the Company alleging a violation of the NLRA regarding the turnover in the bargaining unit or witness list.

those who have joined the company since that time. The 2010 unit is not a reasonable complement to the current unit and the election must be set aside.

An election will be directed only if a substantial and representative employee complement appears to exist in the bargaining unit. *K-P Hydraulics Co.,* 219 NLRB 138 (1975). In situations where a substantial and representative complement does not exist, the general practice is to dismiss the Petition as untimely, rather than direct an election at a future date. *Id.* In determining whether a substantial and reasonable complement exists, the Board examines both the percentage of the employee complement and the percentage of the job classifications filled. The Board considers one or more of the following factors:

- The size of the employee complement at the time the election is directed, which may be more substantial and representative than at the time of the hearing. *Bell Aerospace Co.,* 190 NLRB 509 (1971); *see also Endicott Johnson de P.R., Inc.,*172 NLRB 1676 (1968);

- The status of the jobs that remain to be filled; if they entail responsibilities and require skills similar to those already occupied, a "substantial and representative complement" finding is more likely. *Frolic Footwear, Inc.,* 180 NLRB 188 (1969); *Redman Indus.,* NLRB 1065 (1969);

- The timing of the unit expansion; a two-year expansion period has been found to be too long to deny current employees an election, while a one-year date has been deemed "a more realistic date for measuring the substantiality of the present force." *Gerlack Meat Co.,* 192 NLRB 559 (1971); *see also Bekaert Steel Wire Corp.,* 189 NLRB 561 (1971); and

- The definitiveness of the employer's expansion plans; an election Petition will not be dismissed on the basis of plans that are speculative. *Canterbury of P.R., Inc.* 225 NLRB 309 (1976).

Furthermore, the guidelines the Board has established for the dismissal of petitions in expanding units apply equally to situations in which the unit is contracting. *Plum Creek Lumber Co.,* 214 NLRB 619 (1974). In cases where the expanding and contracting workforce results from the seasonal nature of the employer's business, the Board will direct that the election be held at or

about the seasonal peak. *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978). Thus, the then-existing complement of employees must be "substantial and representative" of the skills and types of employees who eventually will compose the total complement. *NLRB v. AAA Alternator Rebuilders, Inc.,* 980 F.2d 1395 (11th Cir. 1993).

The same concepts apply to the present case. Here, the bargaining unit has significantly changed compared to the 2010 unit. As mentioned above, only 16 of the 32 employees who were eligible to vote in the 2010 Election still remain at the Company. The current unit has 37 drivers. The 2010 unit is not a "substantial and representative employee complement" to the current unit. This is especially true since the election was decided by 3 votes. The Board must set aside the 2010 election. *See K-P Hydraulics Co., supra,* 219 NLRB 138; *see also NLRB v. AAA Alternator Rebuilders, supra,* 980 F.2d 1395.

Additionally, in *NLRB v. Connecticut Foundry Co., supra,* 688 F.2d at 881 and *NLRB v. Nixon Gear, Inc.*, 649 F.2d at 914, the courts' refusal to enforce Board orders was based in part on the assertion that the "the labor force at the Company has undoubtedly changed since the election, and there is no way of knowing at this time if the Union enjoys a majority of support." *Nixon Gear*, supra, 649 F.2d at 914, quoted in *Connecticut Foundry*, supra, 688 F.2d at 881. Clearly, the same can be said of the bargaining unit here where 7 of 13 witnesses are no longer employed by the Company and more than half of the current drivers were not employed by the Company at the time of the 2010 Election. Where a company's workforce has changed substantially since the election, there is no way of knowing if, as in this case, the union enjoys the majority support. *Connecticut Foundry*, 688 F.2d at 881; *Nixon Gear*, 649 F.2d at 914; *National Posters, Inc. v. NLRB*, 885 F.2d 175, 180 (4th Cir. 1989).

Moreover, in its opinion, the D.C. Circuit relied upon *Drukker Commc'ns, Inc. v. NLRB*, 700 F.2d 727 (D.C. Cir. 1983) and *Ind. Hosp., Inc. v. NLRB,* 10 F.3d 151 (3d Cir. 1993) to determine that the hearing officer and the Board wrongfully revoked O'Reilly's subpoenas. Both cases were remanded to the Board. In both cases, the Board re-opened the hearing and enforced the previously revoked subpoenas. However, the amount of time between the original hearing and the post-remand hearing in the above cases was far less than in the present situation. In *Drukker*, for instance, only 3 years had passed between the original hearing and the re-opened hearing. *See Drukker Commc'ns, Inc.,* 277 N.L.R.B. 418, 418 (N.L.R.B. 1985). In *Indiana Hospital,* even less time had passed: only 2 years. *See Ind. Hosp. Inc.*, 1994 NLRB LEXIS 611, *1-2 (N.L.R.B. Aug. 11, 1994). In the present case, over 5 years has passed including 3 years in which the case was held in abeyance. Thus, although these cases are similar to the present situation in that the hearing officer and the Board erred in revoking the Company's subpoenas, they are distinguishable in the amount of time that has passed. In this case, the substantial passage of time necessitates the Board's overturning the election instead of re-opening the hearing. To hold otherwise, would once more prejudice O'Reilly's ability to present its case since its access to the evidence it needs are uncertain at best and unattainable at worst. O'Reilly should not be punished for the NLRB's conduct resulting in prejudicial error.

Thus, due to the delay and turnover experienced, equitable principles require the Board to forego re-opening the objections hearing, and to instead order the election be set aside and the Petition dismissed.

E. If the Board Does Not Set Aside the Election and Approve the Union's Withdrawal of the Charge, It Should Re-Open the Objections Hearing and Enforce the Company's Subpoenas So Long As the Documents Have Been Properly Preserved, Which if They Have Not, Then the Board Must Set Aside the Election.

Should the Board decide not to set aside the 2010 Election and approve the Union's withdrawal of the Charge, the Board should re-open the hearing on objections and enforce both of O'Reilly's subpoenas. If the Board does re-open the objections hearing, the Board should require that the subpoenaed documents be produced at least 30 days *prior* to the re-opening of the hearing. This would ensure the Company the opportunity to review the documents and to locate and serve potential witnesses.

Of course, the above argument assumes that Counsel for the General Counsel, the Union, and Castillo have fully and properly preserved all the documents sought by O'Reilly's subpoenas. If any party has failed to do, then O'Reilly would necessarily be subject to the same prejudice it suffered at the original objections hearing. A party's failure to preserve critical evidence specifically at issue in litigation spanning more than 5 years is inexcusable and must be subject to the harshest sanctions under the law. All parties subpoenaed were represented by counsel so there can be no excuse for a failure to preserve documents. Counsel for the General Counsel also had a duty to ensure the documents at issue were preserved during the litigation. Accordingly, if the subpoenaed documents have not been preserved and cannot be produced, the Board must set aside the election and dismiss the Petition.

III. CONCLUSION.

In light of the Counsel for General Counsel's Motion and the Union's request, the withdrawal of Charge should be approved, with prejudice, and the 2010 Election should be set aside. If this is not granted, since the D.C. Circuit found the Company was prejudiced by the wrongful revocation of its subpoenas, the Complaint against the Company for its refusal to

bargain must be dismissed. Further, due to the significant passage of time since the objections hearing, the Company no longer has access to the same evidence it once had, nor can it be said that the witnesses it would call would have the same memory of events that occurred 5 years prior. Additionally, the makeup of the bargaining unit has drastically changed due to the significant turnover at the Company. The election should be set aside and the Petition dismissed. Should the Board decide to re-open the objections hearing, the Board should require the subpoenaed documents be produced at least 30 days *prior* to the re-opening of the hearing to ensure the Company has the opportunity to review the documents and locate and serve potential witnesses, given the 5 year delay since the objections hearing was held. If Counsel for the General Counsel, Castillo, and the Union have failed to preserve the documents requested by the subpoenas, the Board should set the 2010 election aside and dismiss the Petition.

Respectfully submitted,

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Dated: September 30, 2015

STATEMENT OF SERVICE

I hereby certify that a copy of **OZARK AUTOMOTIVE DISTRIBUTORS INC. D/B/A O'REILLY AUTO PARTS' REPLY TO NLRB'S MOTION TO REMAND CASE TO REGIONAL DIRECTOR FOR APPROVAL OF THE UNION'S WITHDRAWAL REQUEST AND STATEMENT OF POSITION ON REMAND** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on September 30, 2015.

The following parties were served via e-mail with a copy of said documents on September 30, 2015.

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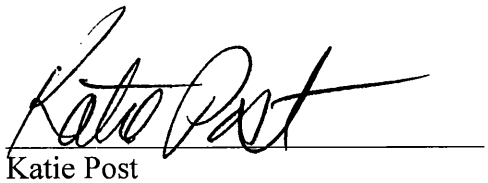

Katie Post

Dated: September 30, 2015